Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1860

CLARENCE H. GOINGS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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Petitioner Clarence H. Goings respectfully prays that a Writ of Certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, in this case.

Opinion Below

The opinion of the Superior Court of New Jersey, Appellate Division (App. A, *infra*) is not yet reported. The Supreme Court of New Jersey denied certification and dismissed the appeal without opinion (App. B, *infra*).

Jurisdiction

The judgment of the Superior Court, Appellate Division, was entered on December 7, 1979. Timely petitions for certification and direct appeal were denied by the Supreme Court of New Jersey on February 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Question Presented

Whether the inventory exception to the Fourth Amendment's warrant requirement extends to the search of sealed containers within a vehicle's closed trunk where the impounding of the vehicle is not incident to arrest and where there exist reasonable alternatives to taking inventory of the container's contents.

Constitutional Provision Involved

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

How the Federal Question Was Presented

Bergen County Indictment No. S-0621-78, filed on April 26, 1978, charged petitioner Clarence H. Goings in two counts with possession of a pistol without the requisite permit, in violation of N.J. Stat. Ann. §2A:151-41, and attempted bribery of two police officers, in violation of N.J. Stat. Ann. §2A:85-1.

Prior to trial, petitioner moved to suppress the pistol, leather shoulder bag and a sum of currency which the police seized from his automobile on the occasion of the incidents referred to in the indictment. An evidentiary hearing on this motion was conducted in Superior Court of New Jersey, Law Division, Bergen County (Hon. Morris Malech, *J.*), which denied the motion to suppress without written opinion on September 12, 1978. Petitioner thereupon entered a *retraxit* guilty plea to both counts of the indictment, preserving his right to appeal the denial of his suppression motion notwithstanding his guilty plea. *Lefkowitz* v. *Newsome*, 420 U.S. 283, 289 (1975). On November 9, 1978, petitioner was sentenced to concurrent indeterminate terms of three years' imprisonment.

Petitioner appealed the denial of his suppression motion and subsequent conviction to the Superior Court of New Jersey, Appellate Division (Fritz, Kole and Lane, *JJ.*), which affirmed the conviction in an opinion dated December 7, 1979 (Appendix A, *infra*). Petitioner thereupon sought timely review in the Supreme Court of New Jersey, which denied his respective petitions for certification and direct appeal on February 26, 1980 (Appendix B, *infra*).

Statement of the Case

On December 7, 1977, at approximately 2:10 a.m., Officers John Schmidig and Marc Fenech of the Bergen County Police Department observed petitioner driving along Route 4 in Teaneck, New Jersey at what they perceived to be an excessive rate of speed. Upon following the car for about one mile, and estimating its rate of speed at 70 miles per hour in a 50 mile per hour zone, the officers pulled over petitioner's vehicle for the purpose of issuing a speeding summons.

Upon approaching petitioner's vehicle, of which he was the sole occupant, the officers requested petitioner's credentials. Although petitioner tendered a valid New York State driver's license and a valid vehicle registration form showing the ownership of the vehicle by his mother, the temporary insurance identification card he produced had expired three months earlier and was thus invalid. Upon ascertaining that petitioner was not sure whether the vehicle was presently insured, the officers advised petitioner that the vehicle would be impounded and towed because it lacked the requisite insurance and that summonses for the speeding and insurance card violations would be issued. Petitioner was not at this point placed under arrest.*

Without further discussion, the officers embarked on an inventory search of the vehicle. Officer Fenech, using a

* At the suppression hearing, petitioner denied that the officers told him of their intention to impound the vehicle, contending that he was not so informed until after he was placed under arrest. It is uncontested that the tow truck was not called for the purpose of impounding the vehicle until after petitioner was arrested. The report regarding the impounding and inventory search of the vehicle lists the purpose of impounding as "arrest."

flashlight, visually inspected the interior portion of the vehicle. Upon checking the seats, the glove compartment and the floor area, he discovered nothing remarkable within the passenger compartment.

In the meantime, Officer Schmidig accompanied petitioner to the rear of the vehicle and directed him to open the trunk. The opened trunk contained a brown leather shoulder bag. The bag was capable of being closed by two leather straps, at least one of which was securely fastened. Petitioner was asked what the bag contained and replied "personal things." The officer asked petitioner whether he wished to remove the bag from the car. Petitioner, however, stated that he wanted the bag left with the car.* Officer Schmidig thereupon proceeded to open the leather bag, which contained a white opaque plastic bag inside of which was a brown paper bag containing a large sum of currency (subsequently determined to be $20,010).

At this point, upon his fellow officer having completed an inventory search of the car interior, Officer Schmidig directed Officer Fenech to make a "more thorough search" of the passenger compartment of the vehicle. Upon making this second "more thorough" search, in which he ran his hands under the car seats and under the dashboard,** Officer Fenech found an unregistered .38 caliber pistol in a recess under the dashboard in front of the driver's seat. Petitioner thereupon was placed under arrest.

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* At the suppression hearing, petitioner denied that he was permitted the option of removing the bag at that stage of the proceedings, nor that he was informed that if he opted to leave the bag with the vehicle, the police intended to open it and examine its contents.

** At the suppression hearing, Officer Fenech conceded that a search under the dashboard, such as he conducted in this case, was not part of a normal or routine inventory search.

Upon placing petitioner in custody, the officers thereupon called the private towing company the police routinely utilized to remove impounded vehicles to its private lot. Petitioner was removed to police headquarters where the two traffic summonses were issued. With the exception of the currency and the revolver, all other items found within the vehicle and inventoried were left with the car.

Several significant aspects of the inventory search conducted herein came to light during the course of the trial court's suppression hearing—matters particularly relevant in light of this Court's most recent consideration of the question in *South Dakota* v. *Opperman,* 428 U.S. 364 (1976).

Although members of the Bergen County Police Department had been instructed routinely to conduct inventory searches of impounded vehicles, the Department had never promulgated a set of standard procedures by which to gauge the scope of such an inventory search. The scope was simply left to the personal discretion of the officers involved in the search. In particular, the Department never issued regulations to govern situations where a car was impounded but the driver was not arrested. Nor was petitioner offered the opportunity to give the police a blanket release from liability for the contents of the sealed portion of the vehicle (such as the trunk) as an alternative to a full-scale vehicle-wide inventory search.

Most importantly, of course, while it was physically possible to do so, the police made no effort whatever to secure the sealed overnight bag contained in the locked car trunk without opening it, searching it and examining its contents.

Reasons for Granting the Writ

The warrantless inventory search of the contents of the sealed container kept within the vehicle's closed trunk incident to a noncriminal impounding is violative of the Fourth Amendment.

This is a case ideally suited for Supreme Court review. It presents substantial questions specifically left unanswered in this Court's earlier decision in *South Dakota* v. *Opperman,* 428 U.S. 364 (1976), regarding the permissible scope of a vehicle inventory search where the automobile is impounded in a non-criminal context and the driver is not arrested.

In particular, this case presents two interrelated questions regarding the permissible breadth and scope of police officers' intrusion into private belongings held within an impounded vehicle, *viz.,* (a) whether the police ordinarily may search a locked trunk or other sealed compartment within the vehicle and (b) whether the inventory ordinarily may include the opening of sealed containers held within a vehicle's trunk or other closed compartments, in the absence of suspected criminal or other exigent circumstances. Also presented are subsidiary questions concerning whether "standard" procedures were used by the police in the course of this search and whether petitioner should have been given the opportunity to elect reasonable alternatives to dispose of his personal property, without having it opened, inspected and inventoried by the police.

Because the police could have discharged their caretaking responsibilities toward the sealed overnight bag held in the locked car trunk in the instant case without opening

the bag and examining its contents, their warrantless intrusion into the sealed bag was not in response to any substantial police necessity and was thus violative of petitioner's Fourth Amendment rights.

This case, then, presents significant questions as yet unanswered by this Court concerning the interface of several of its most recent decisions addressing the continued right to privacy of personal property stored within vehicles —*South Dakota* v. *Opperman; United States* v. *Chadwick,* 433 U.S. 1 (1977) and *Arkansas* v. *Sanders,* 99 S.Ct. 2586 (1979).

A. The Overbroad Inventory Search

The starting point of our analysis is, of course, this Court's decision in *South Dakota* v. *Opperman, supra.* Pursuant to their community caretaking and public safety responsibilities, police may conduct warrantless routine inventory searches of vehicles lawfully impounded for traffic or safety violations if the searches follow standard police operating procedures and are not motivated by an investigative purpose. *Id.,* 428 U.S. at 372, 374-76 (warrantless inventory search of unlocked glove compartment upheld when police saw valuables in plain view within passenger compartment of car).

In *Opperman,* the Court noted three rationales for the police practice of securing and taking inventory of the contents of an impounded vehicle: (a) protection of the owner's property while it remains in police custody; (b) protection of the police against claims of lost or stolen property; and (c) protection of the police from potential

danger (*Id.*, 428 U.S. at 372, 375-76). The Court, however, did not conduct a particularized examination of each consideration in determining the legitimacy of the *Opperman* inventory search.*

Indeed, while upholding the concept of routine inventory searches in principle, *Opperman* itself by no means foreclosed challenges regarding the permissible scope of a potentially overbroad vehicle inventory search. The plurality in *Opperman* merely approved of searches within the unlocked glove compartment, "since it is a customary place for documents of ownership and registration . . . as well as a place for temporary storage of valuables" (*Id.*, 428 U.S. at 372).

While it thus seems clear that vehicle inventories may routinely be extended to unlocked glove compartments, and other open areas within the passenger compartment, it is equally clear that the Court has by no means extended such inventories routinely to those parts of a vehicle that are ordinarily closed and sealed from public access, e.g., car trunks.

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* In *Opperman*, the Court cited with approval state and federal cases upholding inventory searches pursuant to standard police procedure, but never defined the precise limit of these searches. On its face, the holding in *Opperman* is limited to approval of an inventory search prompted by the presence of valuables in plain view inside the car when the owner is not present to make other arrangements for the safekeeping of his belongings. *Id.*, 428 U.S. at 375-6. Four justices in *Opperman*, however, stated that police entry to remove articles in plain view from a car could not alone justify a further search into the car's closed areas. See 428 U.S. at 377-78 n.2 (Powell, J., concurring); *id.*, at 387 n.4 (Marshall, J., with Brennan & Stewart, JJ., dissenting).

Most noteworthy, of course, is the fact that in *Opperman*, the trunk of the impounded vehicle was not opened. As Justice Powell observed:

> The only notation regarding the trunk was that it was locked. A police officer testified that all impounded vehicles are searched, that the search always includes the glove compartment and that the trunk had not been searched in this case because it was locked. *Id.*, 428 U.S. at 380 n.6.

As one respected commentator recently has noted in this regard, if the ultimate rationale of an inventory search is to secure valuables and safeguard the police from liability for loss, the mere fact that the police may freely inventory the open portion of the passenger compartment does not necessarily mean that they may freely explore already securely sealed closed areas elsewhere within the vehicle:

> The dissenters are quite correct, therefore, in saying that *Opperman* does not settle "whether the police might search a locked trunk or other compartment." Although some authority is to be found approving of an inventory which extends to the locked trunk of the vehicle, there is much to be said for the contrary position. "Valuables locked in the trunk of an automobile . . . present no great danger of theft," (citation omitted) as a trunk is much more secure than the passenger compartment of an automobile. Thus, the fact that *Opperman* permits the opening of a locked passenger compartment should not be taken to mean that the opening of a locked trunk is equally permissible to safeguard property. Nor can it be said that opening the trunk is necessary to protect the police against property claims. As the *Opperman* dissenters noted, "if such claims can be deterred at all, they might more effectively be deterred by sealing the doors and trunk

> of the car so that an unbroken seal would certify that the car had not been opened during custody." (citation omitted).
>
> 2 W. LaFave, *Search and Seizure* §7.4(a) at 579 (1978).

Moreover, besides not directly authorizing routine warrantless intrusions into securely sealed portions of vehicles, *Opperman* similarly did not authorize the random opening of closed containers in the vehicle. As the dissenters stressed, "the Court's opinion does not authorize the inspection of suitcases, boxes or other containers which might themselves be sealed, removed and secured without further intrusion" (*Id.*, 428 U.S. at 388 n.6). Thus, *Opperman* cannot be said to have approved the routine inventories of the contents of such containers. Indeed, to the extent that *Opperman* is based upon what the plurality refers to as a "diminished . . . expectation of privacy as to autos," its reasoning does not necessarily extend to containers within vehicles, for the Court has more recently ruled that "a person's expectations of privacy in personal luggage are substantially greater than in an automobile." *United States* v. *Chadwick*, 433 U.S. 1 (1977).*

In analogizing these principles to the facts at bar, it is clear that the inventory search conducted herein was wholly

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* Indeed, the Court again addressed this issue last Term in *Arkansas* v. *Sanders*, 99 S.Ct. 2586 (1979), where it upheld the exclusion of evidence seized from suitcases in the car trunk of the taxi in which the defendants were riding. In upholding the exclusion of the evidence seized, the Court stated that the warrant requirement applies to personal luggage taken from a moving vehicle lawfully stopped to the same degree it applies to luggage seized at other locations. Thus, insofar as police are entitled to conduct warrantless searches of personal luggage, their actions must be justified under some exception to the warrant requirement other than for automobiles (*Id.*, 99 S.Ct. at 2593-94).

excessive for the simple purpose of securing a vehicle impounded for a traffic infraction while absolving the police officers of any potential civil liability for items within the vehicle potentially lost or stolen. No valuables of any kind were found within the passenger compartment during the officers' first search. When the trunk was opened, at the officers' explicit direction, the only item found therein was a closed leather shoulder bag with at least one of its straps already fastened. When the officers asked petitioner whether he wished to take the bag, he stated that he wished it to remain locked up within the car trunk. It was at this point that the officers opened the closed bag and opened two smaller bags within it, wherein they found the large amount of currency. It was this discovery, in turn, which led to the subsequent investigatory search of the passenger compartment.

Clearly, where the bag was already securely sealed and was being kept within a safe and secure locked compartment within the vehicle—the locked car trunk—the police had no further justification, absent suspected criminality or exigent circumstances (neither of which are applicable here) to do anything but to inventory the sealed bag as "one shoulder bag" and replace it within the sealed compartment whence it came.

Obviously, where the shoulder bag has been sealed up in the locked car trunk at petitioner's express direction, he could hardly be heard to complain later in the event of loss or theft. The police, however, gave him no such option and the closed bag was opened, inventoried and the contents thereof used as pretext for a further investigatory

search of the passenger compartment, wherein a revolver was discovered under the dashboard.

Indeed, state and federal courts which have examined whether the permissible scope of an inventory search extends to a closed piece of luggage in a sealed and secure compartment within a vehicle generally have held that it does not. In *Mozzetti* v. *Superior Court,* 4 Cal.3d 699, 99 Cal. Rptr. 412, 484 P.2d 84 (Cal. Sup. Ct. 1971), the California Supreme Court concluded that a warrantless inventory search of an unlocked suitcase on the rear seat of an automobile lawfully in custody after an accident was not justified, notwithstanding that the search was merely part of a routine inventory. While the court acknowledged the right to inventory items left in plain view, this did not extend to the *contents* of closed receptacles. If necessary, the court held, such suitcases should be locked in the car trunk or some other secure place, without delving into their interior.

Similarly, in *State* v. *McDougal,* 68 Wis.2d 399, 228 N.W.2d 671 (Wis.Sup.Ct. 1975), in considering the validity of a search of locked suitcases in the trunk of an automobile during an inventory search, the Wisconsin Supreme Court held:

> The essence of these and other cases so holding is that the objects sought to be achieved by the inventory search—protection of the police from claims of theft and protection of the defendant's property—do not usually require an inspection of closed suitcases and containers. We conclude this principle holds true in this case. The sheriff's department could have simply inventoried "two green suitcases."
>
> As far as possible claims against the officers are concerned, the sheriff could easily have inquired of the

> defendant whether he desired an inventory of the suitcases' contents. Furthermore, the officers would be just as well protected against claims of theft by inventorying and sealing the closed suitcases as by inventorying their contents.
>
> *Id.*, 228 N.W.2d at 678.*

In the pre-*Opperman* case of *State* v. *Gwinn*, 301 A.2d 291 (Del. Sup.Ct. 1973), the Delaware Supreme Court similarly held that closed containers found within impounded vehicles may not be opened:

> The opening of the satchel and an inventory of its contents were not necessary for the stated protective purpose. An effective sealing device or chain lock device suitable for suitcases and other baggage found in a motor vehicle during an inventory would have sufficed for the security purposes sought.
>
> *Id.*, 301 A.2d at 294.

For other cases to the same effect, see *People* v. *Grana*, 185 Colo. 126, 527 P.2d 543 (Colo. Sup. Ct. 1974) (closed flight bag); *State* v. *Keller*, 265 Ore. 622, 510 P.2d 568 (Ore. Sup. Ct. 1973) (fishing tackle box bound closed by wire); *State* v. *Bradshaw*, 322 N.E.2d 311 (1974) (locked attache case).

Furthermore, the lower court opinions in *Chadwick, supra*, reveal that the evidence contained inside the suitcases

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* In this same context, see *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979), in which the Eighth Circuit upheld the suppression of a knapsack found during a routine inventory search of an automobile. The Court ruled that the police should have inventoried the knapsack as a unit rather than opening it and itemizing its contents because the knapsack was tightly closed and posed no obvious danger to police (*Id.*, 594 F.2d at 1202); *Cf.*, *United States* v. *Ochs*, 595 F.2d 1247 (2d Cir. 1979) (open question whether *Opperman* permits inspection of sealable containers in the course of an inventory search).

accompanying the footlocker within the car trunk similarly was suppressed in the face of the Government's arguments that the search of the suitcases was valid as an inventory search under the regulations of the Drug Enforcement Administration.

Despite the selfsame arguments advanced therein to justify the inventory search—safeguarding arrestee's personal property, insulating the agents from civil liability and institutional safety—both the District Court and the First Circuit still ordered suppression of the evidence:

> None of these considerations is available to justify as inventory searches the breaking into the suitcases . . . [B]reaking open the suitcases . . . was an unreasonable and, therefore, unacceptable approach to the problem.
>
> * * *
>
> As the Court below pointed out, to protect the agents from later claims, the suitcases could have been sealed with tape which the agents could have initialed, or placed in a locked storeroom with the keys kept in an envelope along with other personal property of defendants. Forcing the locks served no apparent purpose other than to satisfy the agents' curiosity.
>
> *Id.*, 532 F.2d 773, 783 (1st Cir. 1976).*

The relevance to the instant case is striking. In this case, the vehicle was being impounded for a traffic violation —not for suspected criminality. When the police ordered petitioner to open the locked trunk, they discovered a closed container therein—a leather shoulder bag with straps

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* Interestingly, the Government's petition for certiorari in *Chadwick* drew into question only the propriety of the footlocker search—the Government apparently conceded that the search of the suitcases could not be justified as an inventory search (Government Cert. Pet. at 5 n.2).

fastened. When petitioner expressed his preference that the sealed container remain locked within the vehicle's securely locked trunk compartment, the police had fulfilled the total extent of their responsibility under their community caretaking function—they had ascertained from the owner how he wanted his personal property disposed of.* Under these circumstances, then, in the event the property subsequently was mislaid or stolen, it would have been the owner's responsibility.

Clearly, however, the police utilized the discovery of this suitcase as a pretext upon which to conduct a full-scale search of the vehicle—far in excess of any search justified for inventory purposes. Nothing contained in *Opperman* or its progeny justifies this clear intrusion into a citizen's justifiable expectation of privacy—both of his person and his property. Accordingly, in light of the significant questions left unanswered by this Court in *Opperman,* certiorari should be granted to consider the extent to which the police may ordinarily intrude without a warrant into a citizen's customary zone of privacy in the context of an inventory search of closed containers within the sealed compartments of an automobile.

B. The Absence of Uniform Departmental Standards

While an inventory search of every impounded vehicle may be standard procedure in the Bergen County Police Department, the instant record makes eminently clear that there was a complete absence of any established procedures

* Compare *Opperman,* where the police entered the passenger compartment precisely because the vehicle owner was not present to dispose of his property.

—standard or otherwise—regarding the manner or scope of the inventory search itself. Indeed, Officer Fenech's testimony left no doubt that the manner and extent of the inventory search was left entirely to the untrammeled discretion of the police officer involved.

The Court's holdings in *Opperman* rested in important part on the fact that the search in that case was conducted in accordance with established standard procedures which, in turn, assured a search limited in scope and not subject to the individual discretion of the searching officer (*Id.*, 428 U.S. at 365-66, 372, 375-76). As noted by Justice Powell, in his concurring opinion:

> More importantly, no significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope. *Id.*, 428 U.S. at 384.

Indeed, the Court quoted with particular approval language in *Cady* v. *Dombrowski*, 413 U.S. 433, 439 (1973) to the effect that:

> the protective search was . . . carried out in accordance with *standard procedures* in the local police department . . . a factor tending to insure that the intrusion would be limited in scope to the extent necessary to carry out the caretaking function.
>
> *Id.*, 413 U.S. at 436.

The inference is irresistable that in the absence of such clearly enumerated standards, the extent of the intrusion is limited only by the officer's untrammeled discretion—clearly impermissible under the Fourth Amendment.

The pragmatic importance of carefully enumerated standards governing the extent and scope of a search is highlighted by the events in this case. Before undertaking a second—and investigatory—search of the passenger compartment, Officer Fenech already had completed a routine inventory search of the interior of the vehicle. Nevertheless, upon the discovery of the contents of the luggage in the trunk, he undertook a second—and far more rigorous—search of the interior of the passenger compartment—a situation which he conceded was far from normal or routine. Because of the lack of established uniform guidelines, the extent of any particular constitutional intrusion may well vary according to the whim and caprice of the officer who is the intruder. Just as the police may not arbitrarily stop automobiles at random for document and registration checks (*Delaware* v. *Prouse,* 440 U.S. 648 (1979)), so, too, they may not randomly pick and choose areas in which to search for valuables.

The gun search conducted herein clearly was more extensive than that required for the officers to satisfy their caretaking responsibilities. The intrusion into the unlocked glove compartment in *Opperman* was approved on the basis that the glove compartment is a place where people normally keep papers and items of value. *Id.,* 428 U.S. at 372. The same can hardly be said for a covered portion underneath the dashboard, which the officer conceded he reached by sitting sideways with his legs out the door of the vehicle.

In any event, the discovery of currency in a locked suitcase in a sealed car trunk hardly constituted sufficient jus-

tification for the all-out investigatory search of the passenger compartment, which had been inventory-searched previously. In the absence of clearly particularized standards or regulations governing the extent of the intrusion permissible in an inventory search, petitioner was wholly unprotected when the initial inventory search conducted herein suddenly metamorphosed into a full-scale investigatory search. In light of the absence of standardized regulations governing the extent of the intrusion, the search conducted herein was clearly overbroad and far in excess of that necessary for the narrow purpose sought to be achieved —the protection of petitioner's property and the insulation of the police from civil liability. Accordingly, the search conducted herein clearly was invalid.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: New York, New York
May 23, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-683-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

CLARENCE H. GOINGS,

Defendant-Appellant.

Argued November 20, 1979; Decided December 7, 1979

Before Judges Fritz, Kole and Lane.

On appeal from Superior Court of New Jersey, Law Division, Bergen County.

Mr. Jack L. Cohen argued the cause for appellant.

Ms. Anne C. Paskow, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney; Ms. Paskow, of counsel and on the brief).

PER CURIAM

Defendant appeals the denial of a motion to suppress evidence seized by Detectives John Schmidig and Marc

Fenech of the Bergen County Police Department when the automobile which defendant was driving was stopped at approximately 2:00 a.m., December 7, 1977, while traveling west on Route 4 in Teaneck at a high rate of speed. The evidence seized was a leather shoulder bag, $20,010 in currency and a fully-loaded .38 calibre automatic pistol. Following the denial of the motion to suppress defendant pled guilty to possession of a pistol without the requisite permit in violation of *N.J.S.A.* 2A:151-41 and attempted bribery in violation of *N.J.S.A.* 2A:85-1. He was sentenced on each count to concurrent terms at the Youth Reception and Correction Center.

The detectives observed defendant's Cadillac traveling at 70 miles an hour for approximately one mile. After stopping the automobile they asked defendant for his license, registration and insurance card. The insurance card which was presented had expired and, therefore, the police officers determined to impound the automobile. When an automobile is to be impounded by the Bergen County Police Department, a private contractor is called to take the automobile to the private contractor's yard. Before releasing an automobile to the private contractor, the police conduct an inventory search. Detective Fenech searched the interior of the automobile. Detective Schmidig asked defendant to open the trunk so that a search could be made of the trunk. In the trunk there was a shoulder bag which had two straps but no locks. One of the straps was fastened; the other one was not. It was admitted at the oral argument that Detective Schmidig offered to have defendant take the shoulder bag, but defendant declined to do so preferring to have it remain in the automobile. Detec-

tive Schmidig, who was concerned primarily with valuables being left in the automobile, proceeded to search the shoulder bag. Inside the leather bag was a plastic bag inside of which was a brown paper bag which contained the currency. When the currency was found, Detective Schmidig told Detective Fenech, who had found nothing in the interior of the automobile, to make a more thorough search. Detective Fenech then found the automatic pistol under the dashboard. Defendant was then arrested for possession of the automatic pistol. It was charged that on the way to police headquarters defendant attempted to bribe the two detectives with the $20,010.

On appeal defendant argues:

(1) Because the police search which revealed the presence of the overnight bag and the gun was neither consented to nor conducted in response to a substantial police need it violated defendant's rights under the Fourth Amendment to the Constitution of the United States and the analogous provisions of the Constitution of New Jersey.

(2) Because the police could have discharged their caretaking responsibilities regarding the overnight bag and its contents without opening the bag and examining its contents, their intrusion into the overnight bag and the other two bags enclosed therein was not in response to a substantial police need and therefore the police action violated defendant's rights under the Fourth Amendment to the Constitution of the United States and the analogous provisions of the Constitution of New Jersey.

(3) The gun search was unlawful for the following three reasons—in addition to the reasons advanced in Point 1:

(a) The Bergen County Police Department had never established a set of uniform standards governing the scope of inventory searches.

(b) The search was unreasonable in scope because it was more extensive than required by any substantial police necessity.

(c) The gun search was a direct result of the search of the contents of the overnight bag and that examination was itself unlawful.

We find these contentions without merit.

It is generally held that where motor vehicles are impounded, it is proper for the police to conduct an inventory search to protect the owner's property while it remains in police custody, to protect the police against claims in disputes over lost or stolen property and to protect the police from potential danger. *E.g., South Dakota* v. *Opperman,* 428 U.S. 364, 369 (1946).

In that case it was pointed out that warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not be upheld. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." [at 367]

The test is the reasonableness of the search. Here, having given defendant the opportunity of removing the shoulder bag, it was entirely reasonable for Detective Schmidig to search the bag so as to protect any valuable

property in the bag and to forestall any claim that might be made against the police of taking valuable contents of the bag. *Cf., State* v. *Roberson,* 156 *N.J.Super.* 551 (App. Div. 1978).

The facts in this case differ in two important aspects from the facts in *State* v. *Ernest Pace,* —— *N.J.Super.* —— (App. Div. 1979). In that case the luggage in the trunk was locked, whereas in this case it could not be locked and was not even securely closed. Additionally, there was no offer to Pace to take the luggage as there was to Goings in this case.

The judgment of conviction is affirmed.

APPENDIX B

Orders Denying Certification

SUPREME COURT OF NEW JERSEY

C-470 September Term 1979

ON PETITION FOR CERTIFICATION

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

CLARENCE H. GOINGS,

Defendant-Petitioner.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-683-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1980.

STEPHEN W. TOWNSEND
Clerk

SUPREME COURT OF NEW JERSEY

16,772 September Term 1979

ORDER DISMISSING APPEAL

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

CLARENCE H. GOINGS,

Defendant-Appellant.

This matter having been duly presented to the Court, it is ORDERED that the appeal in the within matter is dismissed pursuant to *R.*2:12-9.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1980.

STEPHEN W. TOWNSEND
Clerk

Supreme Court, U. S.
FILED
JUN 23 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1860

CLARENCE H. GOINGS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1860

CLARENCE H. GOINGS,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

On Petition for a Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

RESPONDENT'S BRIEF IN OPPOSITION

The respondent State of New Jersey respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the judgment of the Superior Court of New Jersey, Appellate Division, in this case.

Opinions Below

The orders of the New Jersey Supreme Court denying petitioner's petition for certification and appeal are reported at —— N.J. ——, —— A.2d —— (February 26, 1980) and appear as petitioner's appendix B, pages

6a to 7a. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears as petitioner's appendix A, pages 1a to 5a. The Superior Court of New Jersey, Law Division, Bergen County, did not issue a written opinion; its oral ruling denying petitioner's motion to suppress evidence appears in the transcript of September 12, 1978 at pages 140 to 151.

Question Presented

Whether the inventory exception to the Fourth Amendment's search warrant requirement extends to the search of a closed shoulder bag found within a vehicle's closed trunk where the impounding of the vehicle is lawful and the nonarrested driver has specifically declined an offer to remove the shoulder bag, preferring instead to leave it with the impounded vehicle.

Statement of the Case

Bergen County Indictment No. S-0621-78, filed April 26, 1978, charged petitioner Clarence H. Goings with possession of a pistol without the requisite permit, N.J.S.A. 2A:151-41 (count one) and attempted bribery, N.J.S.A. 2A:85-1 (count two). Prior to trial petitioner moved to suppress a pistol, leather shoulder bag and currency in the amount of $20,010 which were seized from his automobile on the occasion of the offenses referred to in the indictment. An evidentiary hearing was conducted on September 11 and 12, 1978, in the Superior Court of New Jersey, Law Division, Bergen County, before the Honorable Morris Malech, Judge, Superior Court. The relevant facts elicited at that suppression hearing demonstrated the following:

While patrolling in an unmarked vehicle at approximately 2:10 a.m. on December 7, 1977, Detectives John Schmidig and Marc Fenech of the Bergen County Police Department observed a brown Cadillac traveling at an excessive rate of speed. Upon following the Cadillac, driven by petitioner Clarence H. Goings, its sole occupant, for about one mile, they determined it to be travelling 70 miles per hour in a 50 mile per hour zone. Thereupon, the detectives activated their red flashing lights and pulled over petitioner's vehicle for the purpose of issuing a speeding summons.

Detective Schmidig approached the driver's side of the vehicle and requested petitioner's credentials while Detective Fenech stood by the passenger's side. Although petitioner tendered a valid driver's license and vehicle registration showing ownership of the vehicle by Vivian Peterson, petitioner's mother, the temporary insurance identification card he produced had expired three months earlier and thus was invalid. In response to the officer's inquiry, petitioner replied that the car belonged to his aunt, and he did not know whether it was insured. Detective Schmidig then advised petitioner that the vehicle would be impounded and towed because it lacked the requisite insurance, and that summons for the speeding and insurance card violations would be issued. Petitioner was not placed under arrest.

At that point the officers conducted a routine inventory of the vehicle. Detective Fenech, using a flashlight, visually inspected the interior portion of the vehicle to check for valuables. Solely for this purpose he checked the seats, glove compartment and floor area, discovering nothing remarkable. Meanwhile petitioner accompanied Detective Schmidig to the rear of the automobile and opened the trunk at the officer's direction. In the trunk

there was a brown leather shoulder bag which had two straps but no locks. One of the straps was fastened; the other one was not.

Petitioner was asked what the bag contained, to which he replied "personal things." Rather than opening it, Detective Schmidig specifically asked petitioner if he wanted to remove the bag from the car. Petitioner, however, rejected this offer and expressed his desire that the bag be left with the vehicle. Consequently, the detective, who was concerned primarily with valuables being left in the automobile, opened the bag to check and inventory its contents. The only reason the bag was opened was to inventory the personal items it contained since it was to be left in the vehicle in accordance with petitioner's preference. In the bag, Detective Schmidig unexpectedly discovered an extraordinarily large sum of currency (described by petitioner as $10,000 but subsequently determined to be $20,010) wrapped in a brown paper bag within a plastic bag.

Upon finding this extraordinary amount of money, Detective Schmidig notified Detective Fenech, who by this time had concluded his brief inspection of the car's interior, to conduct a more thorough search, a "double check," inside the vehicle to insure that no other valuables were present. Thereupon, as a result of these unusual circumstances, Detective Fenech conducted a more careful search of the car's interior. Specifically, he rechecked under the seats and ran his hand into the spring areas. He also checked under the dashboard by running his fingers along the lip by the steering column. Both officers testified that money and other items had been found under dashboards in the past, and it was this memory coupled with the discovery of the large amount of money in the trunk that prompted Detective Fenech

to check in this area. Behind the dashboard lip, the detective discovered an unregistered, fully loaded .380 caliber automatic pistol.

Upon its discovery, petitioner was arrested for possession of the pistol and advised of his rights. The B & K Towing Company, the private contractor utilized by the Bergen County Police Department, was called and its wrecker arrived to remove the impounded automobile to its lot. Petitioner was transported to police headquarters in the patrol vehicle. Enroute, the bribery offense was committed.

At the suppression hearing, it was also adduced that within the Bergen County Police Department, there exists a written order requiring that an inventory be routinely conducted for all vehicles which are impounded. Such standard inventory consists of a survey of a vehicle's exterior to check for damage, and its interior, including the trunk, to locate and itemize valuables. A standard report form or "inventory sheet" is completed with respect to each inventory inspection. At headquarters, the officers in the instant matter prepared their report and inventory sheet, and the two traffic summons were issued to petitioner. Items which were left in the vehicle were included on the inventory sheet; items which were removed from the automobile (the bag, the $20,010 and the unregistered weapon) were listed on a separate "evidence list" or "property sheet."

At the conclusion of the hearing, the court denied petitioner's motion to suppress the items taken from the automobile. Thereafter, following a short recess, petitioner entered a *retraxit* guilty plea to both counts of the indictment pursuant to a negotiated plea arrangement. On November 9, 1978, Judge Malech sentenced petitioner in accordance with the plea bargain to concurrent indeter-

minate terms to three years at the Youth Reception and Correction Center.

Petitioner appealed the denial of his suppression motion and conviction to the Superior Court of New Jersey, Appellate Division (Fritz, Kole, Lane, JJ.A.D.). That court affirmed the judgment below in a written opinion dated December 7, 1979. (Petitioner's appendix A, pages 1a to 5a). Thereafter, the New Jersey Supreme Court denied petitioner's petition for certification and appeal on February 26, 1980. (Petitioner's appendix B, pages 6a to 7a). The instant petition for a writ of certiorari to the Superior Court of New Jersey, Appellate Division, follows:

REASONS FOR DENYING THE WRIT

The facts of record do not legitimately permit resolution of the issue formulated by petitioner.

A. The inventory search was properly found constitutional under the holding in *South Dakota* v. *Opperman*.

As recognized in *Ker* v. *California,* 374 U.S. 23, 83 S. Ct. 1623, 10 L. Ed. 2d 726 (1963), the states are not precluded from developing workable rules governing searches and seizures to meet the practical demands of the law enforcement community provided those rules do not violate the federal constitutional proscription against unreasonable searches and seizures. It is submitted that the State of New Jersey appropriately determined the instant search to fall within the inventory rationale approved in *South Dakota* v. *Opperman,* 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976). Moreover, the legitimate facts of record do not permit the proper formulation or resolution of the issue presented by petitioner as to whether an inventory search into closed containers within the trunk of an automobile is constitutionally valid.

The Court has ruled it constitutionally permissible for the police to routinely inventory the contents of a vehicle which they have lawfully taken into custody in *South Dakota* v. *Opperman, supra.** As articulated, such an inventory procedure serves three distinct needs: (1) it protects the owner's property while it remains in police custody, (2) it protects the police against claims or disputes over lost or stolen property, and (3) it protects the police from potential danger. *Id.* at 428 U.S. 369. Such standard inventories may properly include an examination of the customary places where documents are kept and valuables are temporarily stored, such as the glove compartment, See *Opperman* v. *South Dakota,* or the trunk. See *Cady* v. *Dombrowski,* 413 U.S. 433, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973); *United States* v. *Edwards,* 557 F. 2d 883 (5th Cir. 1978), *cert.* den. —— U.S. ——, 99 S. Ct. 458 (1978). Certainly, the reasonable and routine entry into the trunk in this matter falls squarely within the inventory inspection endorsed by this Court.

Petitioner claims, however, that intrusion into a sealed container, in this case an unlocked leather shoulder bag with one of its two straps fastened, was overbroad. This pure question of whether the scope of an inventory search extends into a closed container found within an automobile's trunk is not legitimately presented by the facts

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* The impoundment in this case was clearly valid under New Jersey law as the automobile lacked the requisite insurance. See *State* v. *Roberson,* 156 N.J. Super. 551, 384 A. 2d 195 (App. Div. 1978), certif. den. 77 N.J. 487, 391 A. 2d 502 (Sup. Ct. 1978). Moreover, petitioner stipulated to the validity of the impoundment in both the trial and appellate courts.

of record.* This is so because petitioner herein was specifically offered the opportunity to remove the unopened shoulder bag intact from the vehicle, and it was only when he rejected this offer and directed that the bag remain with the automobile that an inventory of its contents became necessary. Thus it was petitioner's own actions which precipitated and necessitated the inventory; he could easily have precluded any intrusion into his bag by accepting its custody when it was proffered, unopened, to him. Once he rejected the choice of removing his bag unopened, it was entirely appropriate for the detective to inventory the contents, not merely for petitioner's benefit, but to safeguard the interests of the police and towing company as well.

---

* The State notes, however, that there is a split among jurisdictions as to whether or not the scope of an inventory search must be arbitrarily limited only to those items in plain view. Some jurisdictions so limit an inventory. See *e.g. State* v. *McDougal,* 68 Wis. 2d 399, 228 N.W. 2d 671 (Sup. Ct. 1975) (search of locked suitcases in trunk invalidated); *State* v. *Keller,* 510 P. 2d 568 (Sup. Ct. Ore. 1972) (search of closed and wire-tied fishing tackle box invalidated); *Mozzetti* v. *U.S. Superior Court of Sacramento County,* 94 Cal. Rptr. 412, 4 Cal. 3d 699, 484 P. 2d 84 (Sup. Ct. 1971) (search of unlocked suitcase invalidated). Others, however, have rejected this plain view limitation. See *e.g. State* v. *Walker,* 119 Ariz. 121, 579 P. 2d 1091 (Sup. Ct. 1978) (inventory search rationale was an alternate theory sustaining the search of an unlocked suitcase in a locked trunk); *In re One 1965 Econoline, Etc.,* 109 Ariz. 433, 511 P. 2d 168 (Sup. Ct. 1973) (inventory search of small suitcase and shaving satchel reasonable); *Williams* v. *State,* 557 P. 2d 135 (Sup. Ct. Wyo. 1976) (inventory of a duffel bag found in a locked trunk when screwdriver used to open trunk was legitimate); *Denson* v. *State,* 128 Ga. App. 456, 197 S.E. 2d 156 (Ct. App. 1973) (valid inventory revealed heroin wrapped in tin foil within an envelope in a bank folder containing other items).

Petitioner further seeks to implicate the inventory of the shoulder bag under this Court's recent holdings in *Arkansas* v. *Sanders,* —— U.S. ——, 99 S. Ct. 2586, —— L. Ed. 2d —— (1979), and *United States* v. *Chadwick,* 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977). Both of those cases dealt with warrantless probable cause searches, however, and not with inventory searches. The underlying rationale of those cases is thus totally inapplicable when analyzing an inventory procedure. As noted in *Chadwick,* in a noncriminal inventory search, probable cause to search is irrelevant and a warrant is not required. The constitutional reasonableness of an inventory search is determined on other bases. *United States* v. *Chadwick, supra* at 433 U.S. 10, n.5.

If petitioner is relying on these decisions for the proposition that certain "expectations of privacy" attended his shoulder bag, his reliance is not appropriately supported by the factual record presented. The record makes clear that petitioner exhibited no expectation of privacy in the shoulder bag whatsoever. Despite his claim that the detective did not offer him an opportunity to remove the bag (a factual claim resolved against petitioner by the State courts), by his own admission at the suppression hearing he indicated that in fact he had no objection to the inventory procedure and the inspection of the bag:

> Q. What did you want done with the bag at that point that the officer was holding the bag?
>
> A. [Petitioner] He could have gave it to me if he wanted to. If he would have given it to me I would have kept it. *I would have opened it and showed him what was in it if he wanted to know.* (transcript of September 12, 1978, p. 109-7 to 12, emphasis supplied).

The fundamental inquiry in any search or seizure, of course, is whether it is reasonable under all the circumstances. See *Cooper* v. *California,* 386 U.S. 58, 87 S. Ct. 788, 17 L. Ed. 2d 730 (1967). Although Detective Fenech had concluded his brief visual inspection of the seats, glove compartment and floor area by the time Detective Schmidig had found the $20,000 in the shoulder bag, the unusual discovery of such a considerable sum in a place where it would not ordinarily be kept certainly and reasonably suggested that a more careful inspection was essential to insure that no other valuables were secreted in the vehicle. The subsequent recheck of the interior, while more thorough, was but minimally intrusive. Specifically, Detective Fenech now ran his hands under the seats and under the dashboard, where the loaded weapon was discovered. The inspection remained an inventory procedure, however, and was not "metamorphasized" into a warrantless probable cause search. Both officers testified that money and other items had been found under the dashboard in the past. Thus while this area might not always be within the scope of every ordinary inventory situation, in the instant matter, when the unexpected discovery of the large sum of money triggered the memory of the dashboard area concealing money and other items in the past, the officers were justified by the situation confronting them in checking this area to locate and itemize valuables. The State maintains that the New Jersey courts correctly determined the instant procedures were both reasonable under the peculiar facts of this case and constitutionally authorized under the inventory rationale of *South Dakota* v. *Opperman.* As such, there is no need for this Court to grant certiorari to address a manufactured issue concerning whether the scope of an inventory search extends to a closed container within the trunk of an automobile.

Moreover, petitioner's application would seem to suggest that the state courts of New Jersey are either unable or unwilling to deal with the issue of inventory searches and the limitation of unreasonable, unconstitutional inventory procedures. Such is not the case. This State is ever vigilant in this area, and most recently has addressed the very issue of the permissible undertaking of an inventory inspection following lawful impoundment in *State* v. *Mangold,* —— N.J. ——, —— A. 2d —— (Sup. Ct. May 19, 1980). In fact, *Mangold* may very well impose a more restrictive criterion than mandated by the federal Constitution, since the Supreme Court of New Jersey has ruled that law enforcement officials must afford the owner or permissive operator the opportunity to remove or make other arrangements for his possessions prior to the undertaking of an inventory of a lawfully impounded vehicle. Consequently, for the additional reasons that the State of New Jersey is vigorously protecting those rights guaranteed by the Fourth Amendment, we submit that the petition for a writ of certiorari is not warranted and should be denied.

B. The inventory procedure was routine within the meaning of *South Dakota* v. *Opperman.*

Within the Bergen County Police Department, there is a written order requiring that an inventory be routinely conducted for all vehicles which are impounded. Such standard inventory consists of a survey of the vehicle's exterior to check for damage, and its interior, including the trunk, to locate and itemize valuabes. A standard report or "inventory sheet" is completed with respect to each inventory inspection.

Petitioner urges that the absence of more specific criteria defining the precise manner and scope of such an inven-

tory inspection renders the instant inventory procedure constitutionally infirm. Contrary to his argument, however, there is no requirement that instructions or procedures more detailed than those existing in Bergen County be promulgated by the local law enforcement agency to demonstrate that an inventory search is routine, in accord with standard procedure and thus constitutionally valid. The State submits that the inventory procedure herein, which fully comports with the one described and approved in *South Dakota* v. *Opperman, supra,* at 428 U.S. 380 n.6, 384 n.11 (Powell, J., concurring), and which was required with respect to all impounded vehicles was "routine." The police officers had no discretion at all with respect to which vehicles to inventory, and the interior and trunk portions of the vehicle were standard areas to be covered. Beyond that, it would be impossible to refine the precise limits of such an inspection, since the unique circumstances of an individual case might properly require a check of a particular area not necessarily involved in another situation. Naturally, of course, an officer's discretion is not absolute, and judicial review is always an available remedy for unreasonable actions.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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